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Protection of persons in the event of disasters

Additional comments and observations received from Governments

Addendum

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I. Introduction

Two additional written replies, containing comments and observations on the draft articles on the protection of persons in the event of disasters, adopted on first reading by the International Law Commission at its sixty-sixth session (2014), were received from Mexico (24 March 2016) and the United States of America (13 April 2016).

II. Comments and observations received from Governments

A. General comments and observations

United States of America

Although the United States of America has some specific concerns regarding the draft articles described in more detail below, it strongly supports the Commission's efforts to improve protection for persons affected by disasters.

First, the United States remains concerned that several of the draft articles (including as described in the commentary) appear to articulate new legal "rights" and "duties", or to represent inaccurately the existing obligations of States. In some cases the draft articles and commentary appear to represent attempts to develop the law progressively without specifically acknowledging that intention. The United States emphasizes its view that the Commission could best contribute to improving protection for persons affected by disasters by providing practical legal guidance, based on existing international law, to countries in need of or providing disaster assistance. For example, countries may be interested in ways they can incorporate international legal principles into their domestic laws on disaster response, or bilateral or regional agreements or arrangements for humanitarian assistance in the event of disasters. Therefore, the United States recommends that the Commission consider converting these draft articles into a more appropriate form for this purpose, such as principles or guidelines. If they remain as draft articles, the United States recommends that the commentary acknowledge that certain of the draft articles reflect proposals for progressive development of the law and should not, as a whole, be relied upon as a codification of existing law.

Secondly, whether the content is framed as rules or guidelines, the United States is concerned that some of the draft articles, as currently drafted, could impede the effective provision of assistance to persons affected by disasters. As explained in more detail below, draft article 14 [11] requires the consent of the affected State as a condition for the provision of external assistance, and fails to consider the possibility that some assistance could be permissible even in the absence of consent in certain circumstances. It is also ambiguous as to whether external assistance may be provided when consent is arbitrarily withheld. Draft article 16 [12] creates an unhelpful and impractical distinction between States, the United Nations and "other competent intergovernmental organizations", which have the "right" to offer assistance, and "relevant non-governmental organizations", which "may" offer assistance. Furthermore, there are some draft articles, noted below, which could benefit from clarification in order to avoid confusion among actors responding to a crisis. The United States would encourage the Commission to reconsider specific draft articles, identified below, in light of the stated purpose of the document.

Thirdly, as described in detail below in connection with draft article 3 [3], the United States has questions and concerns about the definition of "disaster" and considers it to be overbroad. In particular, the definition of disaster should clearly exclude events that routinely occur in armed conflict. Moreover, with respect to armed conflict, the United States considers draft article 21 [4] and its commentary to be an insufficient response to the discord between the draft articles and international humanitarian law. The United States would strongly prefer to define "disaster" in a way that does not include the consequences of armed conflict. The Commission could then explain, either in the commentaries or in a subparagraph of the definition, that a disaster may coincide in time and space with events constituting part of an armed conflict, and that in such a case — the "complex disaster" with which the Commission appears to be concerned — the draft articles apply to responses to the "disaster", while international humanitarian law applies to the conduct of the armed conflict, including the protection of war victims and belligerent occupation.

B. Specific comments on the draft articles

1. Draft article 1 [1] — Scope

United States of America

With respect to paragraph (2) of the commentary, the United States reiterates its concern with the approach of articulating new "rights" and "duties" of States. In particular, it disagrees with the suggestion that such "duties" apply not just to persons within each State's territory but to all persons "under [each State's] jurisdiction or control". Although some specific provisions of treaties do impose obligations on States parties outside their territories, international law generally does not.

In addition, to the extent the draft articles address obligations on "international organizations and other entities", the draft articles should reflect that international organizations and other entities may be under different legal obligations, which may also differ from those of States.

2. Draft article 2 [2] — Purpose

United States of America

The United States strongly supports the purpose identified in draft article 2 [2]. However, as explained throughout these comments, it has concerns that certain draft articles, as currently drafted, may be inconsistent with that purpose.

Paragraph (9) of the commentary incorrectly asserts that "some of the relevant rights are economic and social rights, which States have an obligation to ensure progressively". While the United States agrees that States parties to the International Covenant on Economic, Social and Cultural Rights[1] are obligated to realize economic, social and cultural rights progressively, non-State parties do not have such an obligation. Furthermore, as a technical matter, the commentary

[1] International Covenant on Economic, Social and Cultural Rights, 1966, United Nations, *Treaty Series*, vol. 993, p. 3.

misstates the obligation described in article 2, paragraph 1, of the Covenant. The United States suggests the following edit:

> "Some of the relevant rights are economic and social rights, which States Parties to the International Covenant on Economic, Social and Cultural Rights have an obligation to ~~ensure~~ realize progressively."

Paragraph (10) of the commentary incorrectly refers to the right to life, and specifically to the International Covenant on Civil and Political Rights, article 6, paragraph 1,[2] as an example of a human right applicable in the context of a disaster and in responding to such a disaster. That provision prohibits the arbitrary deprivation of life through State action and requires protection of that right by law. There is no basis for regarding this provision as the source of any international obligation of a State to address the threat or jeopardy to life caused by a disaster or calamitous event affecting that State. Any such responsibility derives from the sovereign responsibility of Governments *vis-à-vis* their population and citizenry. The United States urges deletion of the last sentence of paragraph (10) and any reference to the International Covenant on Civil and Political Rights, as inappropriate in this context.

3. Draft article 3 [3]

Definition of disaster

Mexico

In the definition of the term "disaster", no limitation is included concerning the origin of the event, that is, whether natural or man-made. This is appropriate, since the text recognizes that there are disasters that may be man-made.[3] However, it should be made clear that armed conflict is not included in this category, in accordance with draft article 21 [4].

United States of America

The United States has significant concerns with the Commission's proposed definition of "disaster" in draft article 3 [3]. First, the United States questions the decision to define disaster in terms of an "event", rather than in terms of the consequences of an event combined with vulnerable social conditions. As the commentary notes, the majority of the non-binding instruments that specifically address disasters focus on the types of hazards and social conditions of vulnerability that disrupt the normal functioning of a community or society. Furthermore, since the first reading of these draft articles, States have adopted the non-binding Sendai Framework for Disaster Risk Reduction 2015-2030,[4] which also focuses on hazards, vulnerability and risks, and the Commission should take into consideration that broadly negotiated framework. The commentary suggests that the Commission considered the definition of "disaster" in the draft articles to be more concise and

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[2] International Covenant on Civil and Political Rights, 1966, United Nations, *Treaty Series*, vol. 999, p. 171.

[3] See European Court of Human Rights, *Öneryıldız v. Turkey*, application No. 48939/99, judgment of 30 November 2004, paras. 9-43; see also Court of Justice of the European Union, *European Parliament v. Council of the European Communities* ("Chernobyl" case), case No. C-70/88, 22 May 1990, paras. 937-943.

[4] General Assembly resolution 69/283, annex II.

precise than those in non-binding frameworks, and the United States would appreciate a more detailed explanation of why the Commission takes this view. In addition, the United States suggests that the Commission consider how this definition relates to draft articles 10 [5 ter] and 11 [16], which are framed in terms of States' efforts to reduce the risks of disasters. Defining a disaster as an event could, in fact, obscure the importance of addressing exposure and vulnerability.

Secondly, regardless of whether the definition is stated in terms of risks or events, it should be clarified so that it clearly does not include events such as situations of armed conflict or other political and economic crises. Paragraph (1) of the commentary helpfully explains that the Commission did not intend to include "political and economic crises" within the definition of disaster. However, the text of draft article 3 [3] does not explicitly exclude political or economic crises, and many political and economic crises would seem to meet the definition of disaster in draft article 3 [3]. For example, a stock market crash, a deflationary crisis, or a crime wave could be "calamitous" and lead to "great human suffering and distress" that "seriously disrupt[ed] the functioning of society".

In particular, armed conflicts almost invariably produce "calamitous ... series of events resulting in widespread loss of life, great human suffering and distress, [and] large-scale material or environmental damage, thereby seriously disrupting the functioning of society". In response to the tragic consequences of armed conflict, international humanitarian law has, over centuries, been developed as a body of principles and rules to address the humanitarian consequences of armed conflict. International humanitarian law rules have been articulated primarily in negative terms, as a body of rules selectively limiting the means and methods by which one party may injure its adversary.

The present draft articles are laudable as an effort to address the humanitarian effects of natural disasters and certain other non-conflict-related man-made disasters such as environmental accidents (e.g., chemical spills or failed dams). However, the proposed definition is so broad as to cover almost any significant disruptive event. In particular, the draft articles are deeply problematic as applied to situations of armed conflict, insofar as they have the potential to conflict with international humanitarian law.

Draft article 5 [7], for example, would create an obligation on the part of States (among other actors) not only to respect but to protect "the inherent dignity of the human person". As noted in the commentary to draft article 5 [7], this obligation, which in the Commission's view flows from international human rights law, would entail "a negative obligation to refrain from injuring the inherent dignity of the human person and a positive obligation to take action to protect human dignity". This rule may, in application, be in strong tension with the balance reflected in the rules of international humanitarian law. International humanitarian law affords certain protections to civilians, depending on the circumstances, but recognizes that civilians may be incidentally injured or killed (but not specifically targeted) in the course of fighting.

Likewise, the duty articulated in draft article 11 [16] to reduce the risk of "disasters", when applied to events constituting part of an armed conflict, could be viewed as imposing responsibilities on parties to a conflict beyond those contained in international humanitarian law (which requires, for example, that parties take feasible precautions in attack and in defence). The potential for this result is

highlighted by the Commission's assertion in the commentary that what is set out in draft article 11 [16] is an "international legal obligation to act in the manner described".

The United States believes that the Commission should maintain draft article 21 [4], which makes clear the intent not to revise international humanitarian law rules, and remove the consequences of armed conflict from the scope of the definition of "disaster". The Commission could note, either in the commentaries or in a subparagraph of the definition, that a disaster may happen to coincide in time and space with events constituting part of an armed conflict, and that in such a case the draft articles apply to responses to the "disaster", while international humanitarian law applies to the conduct of armed conflict. The United States would urge the Commission to consider adopting this simplified approach, which would avoid the need for many assessments as to whether international humanitarian law was applicable. The United States recommends explicitly excluding, at a minimum, events that routinely occur during armed conflict from the definition of "disaster". The Commission also may want to consider a definition that expressly excludes political and economic crises.

[See also the comments below under draft article 21 [4]].

4. **Draft article 4**

Use of terms

Mexico

The inclusion of draft articles 4, 14 [11], 17 [14], 18 and 19 [15] is welcome, since they reflect the concerns expressed by various delegations.

United States of America

With respect to draft article 4, subparagraph (a), the United States is concerned by the inclusion of "otherwise under [its] jurisdiction or control" in the definition of "affected State". The United States thinks this standard sets the bar for triggering the present draft articles too low and sows confusion with respect to the application of other draft articles. Under this definition, a State could become an "affected State" when "persons, property or the environment" under its mere "jurisdiction" or "control" — a form of influence falling well short of territorial sovereignty — are affected by a disaster. Such a State, as an affected State, would then have, inter alia, corresponding duties to seek external assistance (draft article 13 [10]), take "the primary role in the direction, control, coordination and supervision of [disaster] relief and assistance" (draft article 12 [9]), and facilitate external assistance through a variety of legal measures (draft article 17 [14]), and the right to require consent to the provision of any assistance (draft article 14 [11]).

All of the aforementioned duties and rights are in potential conflict with the prerogatives of the State with sovereignty over the territory in which the disaster occurs. This tension arises in the very phrasing of the draft article. Specifically, draft article 12 [9], paragraph 1, asserts that the affected State — even if that State is "affected" by virtue of mere "jurisdiction" or "control" over persons or property, and not by virtue of any degree of territorial sovereignty — has the duty to ensure the protection of persons and provision of disaster relief and assistance on its territory "by virtue of its sovereignty". Indeed, the Commission notes in the

commentary to draft article 4 that under these definitions there could be multiple "affected States", and that, in the absence of any special agreement between them, the draft articles "d[o] not ... provide a definitive solution as to which affected State's consent would be required" under draft article 14 [11]. The United States considers this a most unsatisfactory situation. It creates the potential for confusion or disagreement among "affected States" that could delay an effective response.

Regarding draft article 4, subparagraphs (b) and (c), the United States would suggest deleting "at its request or with its consent". This aspect of the definition is not necessary, as requests for and consent to assistance are addressed in more detail in other draft articles.

In draft article 4, subparagraph (e), the use of the term "sent by" in the definition of "relief personnel" could be read to preclude the local hires of the "assisting State or other assisting actor". The United States believes draft article 18 (protection of relief personnel, equipment and goods) should apply to local relief workers, not just international workers. Therefore the United States suggests changing the definitional language to "sent in or locally recruited by".

The commentary, in paragraph (12), states that domestic non-governmental organizations are not covered in the draft articles. The United States believes that such organizations should be held to the same standard as external assisting organizations and should receive similar consideration. Given the role that domestic organizations, such as National Red Cross and Red Crescent Societies, play in disaster preparation and response, the United States recommends considering their appropriate inclusion in these draft articles. For example, if the commentary were revised, States would be expected to cooperate with and seek assistance from relevant domestic non-governmental organizations (draft articles 8 [5] and 13 [10]).

5. Draft article 5 [7]

Human dignity

United States of America

Although the United States agrees that respect for human dignity should be a key component of disaster preparation and response, it disagrees that States, international organizations and relevant non-governmental organizations have a general legal obligation to "respect and protect the inherent dignity of the human person". Paragraph (1) of the commentary asserts that this principle derives from international human rights instruments. Many of these instruments, such as the International Covenant on Civil and Political Rights, recognize the inherent dignity of the human person, and state that the rights identified in the instrument derive from it. However, they do not impose any special or distinct obligation to protect "dignity". To the extent this draft article is intended to refer to the specific obligations of States parties to treaties to protect rights that derive from the principle of human dignity, protection of human rights is already addressed in draft article 6 [8]. Accordingly, the United States recommends changing "shall" to "should".

The United States disagrees, as a legal matter, with the statement in paragraph (6) of the commentary that "the duty to protect" requires States to adopt legislation proscribing activities of third parties in circumstances that threaten a violation of the principle of respect for human dignity, even though this statement reflects a

worthy policy objective. The commentary does not identify the source of this duty, and the sources in this paragraph are all non-binding guidelines and principles. To the extent this is an attempt to develop the law progressively, it should be clearly identified as such and state the legal support for this development.

See also the general comments under draft article 3 [3] concerning the relationship between the draft articles and international humanitarian law.

6. Draft article 6 [8]

Human rights

Mexico

It would be appropriate to add a reference to the power of States, established in different international human rights instruments, to suspend certain rights in certain circumstances, for example, in situations in which State security is threatened,[5] which may happen in the event of a disaster in the context of these draft articles.[6] In that regard, Mexico appreciates the fact that, in the commentary to this draft article, the Commission recognizes the possibility of derogation; however, this possibility is not obvious from the current wording of the draft articles.

United States of America

The United States agrees that States should promote and protect the human rights of individuals in their territory, including those affected by disaster, in accordance with their obligations under international human rights law. The United States appreciates the explanation in the commentary, paragraph (4), that different States have different legal obligations in this respect.

See also the general comments under draft article 3 [3] concerning the relationship between the draft articles and international humanitarian law.

7. Draft article 7 [6]

Humanitarian principles

United States of America

The United States greatly appreciates the inclusion in the draft articles of the humanitarian principles, which are incredibly important to humanitarian responses. However, it would suggest replacing "in accordance" with "consistent", which would be more accurate given the non-binding nature of the principles.

The United States also appreciates that draft article 7 [6] reflects the importance of non-discrimination during the response to and recovery from disasters. The United States suggests including disability explicitly within the second sentence of paragraph (6) of the commentary and adding a citation to the Convention on the Rights of Persons with Disabilities[7] in the footnote. It would also

[5] International Covenant on Civil and Political Rights, 1966, United Nations, *Treaty Series*, vol. 993, p. 3, art. 4; American Convention on Human Rights, 1969, United Nations, *Treaty Series*, vol. 1144, p. 144, art. 27; European Convention on Human Rights, art. 15.

[6] This was the case in Ecuador, where a state of emergency was declared following the explosion of the Cotopaxi volcano.

[7] Convention on the Rights of Persons with Disabilities, United Nations, *Treaty Series*, vol. 2515, p. 3.

suggest that, with respect to "the needs of the particularly vulnerable", the commentary highlight the need to minimize the risks of, and address the effects of, harm, exploitation and abuse for disaster-affected populations. For example, there is often an increased risk of exploitation and abuse in the aftermath of a disaster, particularly trafficking of children and adolescent girls.

8. Draft article 8 [5]

Duty to cooperate

United States of America

The United States reiterates its general comments regarding the articulation of what appear to be new "rights" and "duties" of States. Although it recognizes the principles of cooperation among States reflected in the Charter of the United Nations and the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations,[8] it does not agree that they impose a specific legal obligation to cooperate with the broad range of organizations listed in this paragraph. Cooperation with external organizations is certainly desirable and may often be beneficial, but which organizations may be most helpful will depend on the particular circumstances of the affected State and the disaster. Thus, the United States recommends that "shall" be changed to "should".

In paragraph (2) of the commentary, the United States recognizes that international cooperation may take on special significance with respect to particular human rights obligations, but also believes the commentary should reflect that different States have assumed different obligations. It suggests the following clarifying edits: "Cooperation may take on special significance with regard to certain international human rights ~~law~~ obligations undertaken by States parties to specific treaties."

In addition, paragraph (2) of the commentary should more closely track article 11 of the Convention on the Rights of Persons with Disabilities, which simply reaffirms existing international obligations. The United States therefore suggests the following addition, from article 11 of the Convention: "International cooperation gained particular prominence in the 2006 Convention on the Rights of Persons with Disabilities, which provides that States parties "'shall take, in accordance with their obligations under international law, including international humanitarian law and international human rights law, all necessary measures to ensure the protection and safety of persons with disabilities ~~is, inter alia, applicable~~ in situations of risk, including situations of armed conflict, humanitarian emergencies and the occurrence of natural disasters.'"

See also the general comments under draft article 3 [3] concerning the relationship between the draft articles and international humanitarian law.

[8] General Assembly resolution 2625 (XXV).

9. **Draft article 9 [5 bis]**

Forms of cooperation

Mexico

Given the broad scope of the draft articles and bearing in mind the wide variety of phenomena covered by them, the wording of this draft article should not give the impression of being exhaustive and of consequently limiting the forms of cooperation that could be provided under the draft articles.

United States of America

[See the comments below under draft article 10 [5 ter]].

10. **Draft article 10 [5 ter]**

Cooperation for disaster risk reduction

United States of America

The United States reiterates its general comments regarding the attempt to articulate new "rights" and "duties" in the draft articles, and its comments on draft article 11 [16].

Accordingly, the United States suggests changing "shall" to "should". It also questions whether it is necessary to include this language in a stand-alone article. It would recommend revising draft article 8 [5] to clarify that cooperation includes efforts to reduce the harms of disasters, or revising draft article 9 [5 bis] to include disaster risk reduction as one of the forms of cooperation. If it is to remain a stand-alone article, the United States recommends adding "as appropriate" at the end, which is consistent with the language on cooperation in draft article 8 [5]. As noted in existing non-binding frameworks on disaster risk reduction, each State has the primary responsibility to take measures to reduce the harms caused by disasters in its own territory. Other States may assist in these efforts, as appropriate.

11. **Draft article 11 [16]**

Duty to reduce the risk of disasters

United States of America

The United States recognizes the importance of each State taking measures to prevent, mitigate and prepare for disasters that could affect its people. However, as previously noted, the United States has concerns with the attempt to articulate new "rights" and "duties" in the draft articles. It disagrees with the assertion in paragraph (9) of the commentary that each State has an obligation under international law to take the necessary and appropriate measures to prevent, mitigate and prepare for disasters.

Paragraph (4) of the commentary suggests that the Commission derived this very specific obligation from the general principles of State sovereignty and non-intervention, but does not provide any explanation of how it was derived, or what the limiting principles might be on which obligations States have as a consequence of their sovereignty. The commentary further suggests that international human rights law supports the creation of a new obligation on States with respect to reducing the risk of disasters. The United States strongly disagrees

with the assertion in the commentary that States have an affirmative obligation to take "necessary and appropriate measures" to prevent human rights violations "no matter the source of the threat". International human rights law applies to States and regulates their conduct with respect to the human rights of individuals in their territory. It does not impose a general obligation on States to protect individuals from private actors, or from the forces of nature. The right to life, as proclaimed in the Universal Declaration of Human Rights, article 3, and elaborated in the International Covenant on Civil and Political Rights, article 6, imposes no duty or obligation on a State affected by a disaster with respect to the protection of individuals from the effects of such disaster and would not require such a State to seek assistance from other States or organizations in this regard.

The commentary suggests that State practice supports this new rule. The voluminous information gathered by the Commission describing national and international efforts to reduce the risk of disasters is impressive and valuable, but the United States does not believe that such information establishes widespread State practice undertaken out of a sense of legal obligation; rather, national laws are adopted for national reasons and the relevant international instruments typically are not legally binding. Notably, the two most significant international frameworks on disaster risk reduction — the Hyogo Framework[9] and the recently adopted Sendai Framework — are both non-binding. As such, there is no basis to conclude that this is a rule of customary international law.

In addition, as explained in the comments of the United States on draft article 3 [3], contemporary approaches to disaster risk reduction focus on minimizing the harm caused by disasters, and the definition of disaster in terms of "events" fails to adequately reflect this approach. If the current definition of disaster is retained, the United States would recommend revising the language of this draft article to focus on harm reduction. Consequently, it would recommend revising the title of this draft article to read: "Responsibility to reduce the risk of disasters", and the first subsection to read: "Each State should reduce its vulnerability to the risk of disasters ...". Alternatively, to the extent this draft article reflects progressive development of the law regarding States' obligations, it ought to be identified as such in the commentary.

Paragraph (17) of the commentary states that the three types of measures noted in paragraph 2 of the draft article are not exhaustive. The United States believes the provision would be strengthened by including a reference to measures that not only identify and communicate risk, but also actually mitigate the risk of future loss of life from future events. To realize meaningful risk reduction, actions should actually be taken to address the assessed risk, such as updating building codes, retrofitting structures against wind and seismic hazards, or elevating or relocating homes out of the flood plain.

Lastly, the United States would emphasize that stating a legal obligation to reduce the risk of disasters is particularly problematic in light of the broad definition of "disasters", as discussed in its general comments on draft article 3 [3]. If one considers "disasters" to include armed conflict or other serious political or economic crises, this draft article would reflect legal requirements to take measures

[9] Hyogo Framework for Action 2005-2015: Building the Resilience of Nations and Communities to Disasters, adopted at the World Conference on Disaster Reduction, Kobe, Hyogo, Japan, 18-22 January 2005 (A/CONF.206/6 and Corr.1, chap. I, resolution 2).

to reduce the risk of disasters that would reach well beyond steps that should be taken with respect to natural disasters or certain man-made disasters (e.g., chemical spills or failed dams). For example, it could raise questions as to whether States have an obligation to engage in diplomatic steps that might reduce the likelihood of an outbreak of hostilities, or fiscal policy measures that might reduce the risk of an economic calamity, but the efficacy or appropriateness of such measures is hardly susceptible to objective assessment.

12. Draft article 12 [9]

Role of the affected State

Mexico

Mexico recognizes that this draft article reflects the primary obligation of States to protect persons and provide humanitarian assistance in the event of disasters;[10] however, Mexico suggests adding the expression "within its capabilities", since in the hypothetical situation in which an affected State lacked the capacity to comply with this rule, it would not be responsible for failing to do so, in accordance with the *ad impossibilia nemo tenetur* principle.

United States of America

As with draft article 11 [16], the commentary fails to explain how the very specific obligation in draft article 12 [9], paragraph 1, has been derived from the general principle of State sovereignty, or what the limiting principles might be on which obligations States have as a consequence of their sovereignty. The United States recommends revising this paragraph to delete "by virtue of its sovereignty", and to replace "has the duty to" with "should". Alternatively, to the extent this draft article reflects progressive development of the law, it ought to be identified as such.

13. Draft article 13 [10]

Duty of the affected State to seek external assistance

Mexico

It is appropriate to establish the right of affected States to seek assistance from among other States, the United Nations, other competent intergovernmental organizations and competent non-governmental organizations. However, in the interests of the principle of State sovereignty, which involves the exclusive right to display the activities of a State provided that the obligation to protect, within the territory, the rights of other States is fulfilled,[11] Mexico suggests that the term "has the duty to" be replaced by "may", so that States, in accordance with their primary obligation to protect persons and provide humanitarian assistance in the event of disasters,[12] can exercise the primary role in the direction, control, coordination and supervision of the provision of disaster relief and assistance on their territory, in accordance with draft article 3.

[10] See ASEAN Agreement on Disaster Management and Emergency Response, Vientiane, 26 July 2005; A/CN.4/696; E/CN.4/1998/53/Add.2, annex.

[11] *Island of Palmas* case, (Netherlands, United States of America), award of 4 April 1928, *Reports of International Arbitral Awards*, vol. II, p. 839 (Max Huber).

[12] See ASEAN Agreement on Disaster Management and Emergency Response, Vientiane, 26 July 2005; A/CN.4/696; E/CN.4/1998/53/Add.2, annex.

United States of America

As with draft articles 11 [16] and 12 [9], the United States has concerns regarding the derivation of a specific "duty" to seek assistance from particular entities based on the general principle of sovereignty. To the extent that the commentary is intended to suggest that international human rights law establishes a general obligation to protect individuals from non-State actors and natural forces, the United States disagrees. It recommends revising this subsection to change "has the duty to" to "should". In this case, the United States supports clarifying in the commentary that a disaster does not relieve a State of the human rights obligations it has undertaken, which may include, in certain circumstances, asking for assistance in the event of a disaster that exceeds its national response capacity. Alternatively, to the extent this draft article reflects progressive development of the law, it ought to be identified as such.

For the reasons that the United States stated with respect to draft article 2 [2] (and paragraph (10) of the commentary), paragraph (4) of the commentary incorrectly includes the right to life among the human rights directly implicated in the context of a disaster. The right to life, as proclaimed in the Universal Declaration of Human Rights, article 3, and elaborated in the International Covenant on Civil and Political Rights, article 6, imposes no duty or obligation on a State affected by a disaster with respect to the protection of individuals from the effects of such disaster and would not require such a State to seek assistance from other States or organizations in this regard. All references to right to life should be removed from this paragraph, including the sentence referring to that right as non-derogable under the Covenant. Indeed, the fact that the Human Rights Committee has advised, in its General Comment No. 29, that a "natural catastrophe" may in certain situations constitute a "public emergency which threatens the life of the nation" and, upon official proclamation, thereby justify certain State measures in derogation of some of that State's obligations under the Covenant (excluding its obligation not to deprive anyone of the right to life), has no bearing on whether an affected State owes a duty to its population to address the effects of the disaster or to seek the assistance of other States in doing so.

Paragraph (4) of the commentary also imprecisely characterizes several of the economic, social and cultural rights described in the International Covenant on Economic, Social and Cultural Rights. The United States recommends that the commentary track the language from the Covenant and the international community's understanding of the right to safe drinking water and sanitation, as follows:

> "a number of human rights are directly implicated in the context of a disaster, including the right to an adequate standard of living, including adequate food, clothing and housing, the right to the enjoyment of the highest attainable standard of physical and mental health, ~~and medical services,~~ the right to ~~the supply of~~ safe drinking water, ~~the right to adequate housing, clothing~~ and sanitation ...".

Later in the same paragraph, the following related edit should be made:

> "The Commission therefore notes that 'appropriate steps' to be taken by a State may include seeking international assistance where domestic conditions are such that the right to an adequate standard of living, including adequate

food, cannot be progressively realized and the affected State has an international obligation to progressively realize such a right."

See also the comments under draft article 4 concerning the definition of "affected State".

14. Draft article 14 [11]

Consent of the affected State to external assistance

Mexico

[See the comment above under draft article 4].

United States of America

The United States does not believe that draft article 14 [11] provides an accurate statement of the *lex lata*. In particular, the United States does not agree with the unqualified statement that "the provision of external assistance requires the consent of the affected State". It would be necessary to consider, based on all of the facts and circumstances, whether the provision of assistance for disaster relief or disaster risk reduction would otherwise violate the territorial integrity of the affected State or would violate the principle of non-intervention. For example, one could imagine a scenario involving a State in which the Government had completely collapsed and where it was not possible to find authorities who could provide consent. Another situation may be where a Security Council resolution applies.

The draft article reveals some of the limitations of framing the draft articles in terms of "rights" and "duties", particularly where such statements are not accurate reflections of existing international law. It could create confusion regarding the legally available options for States that seek to provide humanitarian assistance to persons affected by disasters. The United States suggests bringing the language of this draft article in line with General Assembly resolution 46/182, which states that "humanitarian assistance should be provided with the consent of the affected country and in principle on the basis of an appeal by the affected country". Similarly, and in line with the general comment that all of these draft articles should be framed as guidelines, the United States recommends changing "shall" to "should" in paragraphs 2 and 3 of the draft article. Again, for the reason stated with respect to draft article 2 [2] (paragraph (10) of the commentary) and draft article 13 [10] (paragraph (4) of the commentary), paragraph (4) of the commentary to draft article 14 [11] incorrectly bases a duty to consent to external assistance on the right to life, as set forth in the International Covenant on Civil and Political Rights, article 6, and suggests that withholding consent for such assistance in the context of a disaster may constitute a violation of the right to life. As support for this assertion, the commentary relies solely on a non-binding proposition, advanced by the Human Rights Committee in 1982, in its General Comment No. 6, that protection of "the inherent right to life" requires that States adopt positive measures and, by way of example, that the Committee considered "that it would be desirable for States parties to take all possible measures to reduce infant mortality and to increase life expectancy, especially in adopting measures to eliminate malnutrition and epidemics." As desirable as such measures and goals may be, and they are certainly aspirations the United States shares, it does not consider such positive measures to be obligatory under the Covenant. The United States strongly recommends deletion

of any reliance on the right to life, including from paragraph (4) of the commentary to the draft article, as inapplicable to the context of disasters. Although reference to the United Nations General Assembly resolutions cited would not provide legal basis for recognizing a duty in this regard, the United States does not object to the factual statement expressed regarding the consequences for victims of natural disasters deprived of humanitarian assistance.

Paragraph (7) of the commentary offers important guidance on the meaning of the term "arbitrary" that should at least be referenced in the draft article. The United States recommends modifying the language of draft article 14 [11], paragraph 2, to read:

> "In accordance with applicable rules of international law and the national law of the affected State, and consistent with the present draft articles, consent to external assistance should not be withheld arbitrarily."

The United States would also recommend exploring in the commentary the relationship between the paragraphs of draft article 14 [11]. For example, it is not clear whether the arbitrary withholding of consent under paragraph 2 of the draft article would affect the consent requirement in paragraph 1, or whether the extreme situations described in paragraph (10) of the commentary, under which a State might be excused from making known its decisions on offers of assistance under paragraph 3 of the draft article, could also be relevant to evaluating a State's consent or withholding of consent under paragraphs 1 and 2 of the draft article.

15. Draft article 15 [13]

Conditions on the provision of external assistance

United States of America

The United States reiterates its view that the draft articles would be most useful as non-binding principles or guidelines. Accordingly, it suggests revising the text of draft article 15 [13] as follows:

> "Such conditions shall be in accordance with ~~the present draft articles~~, applicable rules of international law and the national law of the affected State, and should be consistent with the present draft articles. Conditions ~~shall~~ should take into account the identified needs of the persons affected by disasters and the quality of the assistance."

16. Draft article 16 [12]

Offers of external assistance

United States of America

The United States appreciates the recognition in the commentary that offers of assistance are "essentially voluntary and should not be construed as recognition of the existence of a legal duty to assist". It also values the commentary's affirmation that offers of assistance made in accordance with the present draft articles may not be discriminatory in nature and should not be regarded as interference in the affected State's internal affairs.

The United States believes additional consideration is merited, however, of the distinction in this draft article between the relative prerogatives of assisting actors.

Draft article 16 [12] provides that States, the United Nations and other competent intergovernmental organizations have the "right" to offer assistance, whereas relevant non-governmental organizations "may" also offer assistance. The commentary suggests that this different wording was used for reasons of emphasis, in order to emphasize that States, the United Nations, and intergovernmental organizations are not only entitled but encouraged to make offers of assistance, while non-governmental organizations have a different nature and legal status. The United States suggests eliminating the distinction and providing instead that States, the United Nations, intergovernmental organizations and non-governmental organizations "may" offer assistance to the affected State, in accordance with international law and applicable domestic laws. Although there is no doubt that States, the United Nations and intergovernmental organizations have a different nature and legal status than that of non-governmental organizations, that fact does not affect the capacity of non-governmental organizations to offer assistance to an affected State, in accordance with applicable law.

The United States also believes that non-governmental organizations should be encouraged — like States, the United Nations and competent intergovernmental organizations — to make offers of assistance to affected States, in accordance with applicable law. Furthermore, States and relevant intergovernmental organizations may choose to support humanitarian relief efforts in an affected State by making grants or contributions to relevant non-governmental organizations, and the United States would not want to inadvertently discourage such methods of support by suggesting that non-governmental organizations should be treated differently by affected States.

17. **Draft article 17 [14]**

Facilitation of external assistance

Mexico

[See the comment above under draft article 4].

United States of America

In line with its general comments, the United States believes the draft article would be more beneficial as a guiding principle, rather than framed as an obligation. Accordingly, it would recommend changing "shall" to "should" in both paragraphs of this draft article. If it remains framed as an obligation, it should be clearly identified as progressive development of the law.

Furthermore, to be consistent with other draft articles, the United States recommends revising the first clause of draft article 17 [14] to read: "the necessary and appropriate measures ...". Although certain measures within the affected State's national law may be necessary to facilitate the provision of assistance, those measures must also be appropriate given the unique circumstances of each disaster.

The United States appreciates the emphasis the draft article places on the importance of the affected State taking the necessary measures within its national law to facilitate the prompt and effective provision of external assistance regarding relief personnel, goods and equipment — in particular, among other things, with respect to customs requirements, taxation and tariffs. Such steps can address a major and avoidable obstacle to effective assistance. Indeed, because the United States

agrees with the idea that it is generally beneficial for an affected State to take steps to exempt external disaster-related assistance goods and equipment from tariffs and taxes in order to reduce costs and prevent delay of goods, it would suggest that paragraph (5) of the commentary recommend that States should waive them, rather than suggest that States could lessen them as an alternative. Along similar lines, the draft article contains an illustrative list of measures for facilitating the prompt and effective provision of external assistance. The United States suggests adding to that list measures providing for the efficient and appropriate withdrawal and exit of relief personnel, goods and equipment upon termination of external assistance. States and other assisting actors may be more likely to offer assistance if they are confident that, when the job is done, their personnel, goods and equipment will be able to exit without unnecessary obstacles.

18. Draft article 18

Protection of relief personnel, equipment and goods

Mexico

[See the comment above under draft article 4].

United States of America

The United States strongly supports efforts to improve the safety and security of humanitarian personnel, as well as efforts to promote effective and timely delivery of humanitarian assistance. Furthermore, it agrees that States should afford at least the same protections to relief personnel, equipment and goods as they would to all other persons and property that they have accepted within their territory, in accordance with their obligations under national and international law.

However, the United States is again concerned that this principle is framed as a legal obligation particular to relief personnel, equipment and goods, without a clear explanation as to the source of such an obligation under international law. Thus, it recommends changing "shall" to "should". If it is retained as a statement of legal obligation, it should be clearly labelled as progressive development of the law.

In addition, the United States suggests making the language of draft articles 17 [14] and 18 more consistent by including an express reference to national law in draft article 18:

"the appropriate measures, <u>within its national law</u>, to ensure ...".

The United States is pleased that paragraph (8) of the commentary addresses the need to evaluate security concerns, having in mind effective delivery of assistance, although it would benefit from further explanation of what constitutes "unreasonable and disproportionate hurdles" for relief activities.

19. Draft article 19 [15]

Termination of external assistance

Mexico

[See the comment above under draft article 4].

United States of America

The United States appreciates that paragraph (5) of the commentary clarifies that "decisions regarding the termination of assistance are to be made taking into consideration the needs of the persons affected by disaster". Ideally, the commentary would specifically recommend that actors consult with the affected populations on whether their needs have been met, rather than having the various actors and States make that determination.

In line with our comments on other draft articles that are currently phrased in terms of obligations, the United States suggests changing "shall" to "should" in both sentences of draft article 19 [15].

20. Draft article 20

Relationship to special or other rules of international law

United States of America

The United States would recommend converting these draft articles into a non-binding statement of principles or guidelines. In that case, it supports the inclusion of this draft article to clarify that the principles do not prejudice States' existing rights and obligations under international law; however, the United States would recommend deleting "special or other".

If these draft articles remain in the present form, the United States would appreciate further clarification of the intent and language of this draft article. As noted in the commentary, the doctrine of *lex specialis* already addresses the applicability of potentially overlapping bodies of law, and it is unclear what this draft article, as currently drafted, adds to that principle.

21. Draft article 21 [4]

Relationship to international humanitarian law

Mexico

Mexico considers it imperative to include this draft article, as it rules out the application of the draft articles in cases solely involving an armed conflict. However, a provision should be added to the draft article to cover cases in which an armed conflict exists at the same time as a disaster occurs.

Mexico suggests that, in accordance with the *lex specialis* principle,[13] the application of the draft articles in situations of armed conflict be permitted insofar as there are no rules applicable to the particular case that are derived from international humanitarian law or that do not run counter to its purposes or application.

United States of America

[See the comments above under draft article 3 [3]].

The United States recognizes that the Commission has grappled with the interaction between the draft articles and the rules of international humanitarian law,

[13] See article 55 of the articles on responsibility of States for internationally wrongful acts. See also General Assembly resolution 56/83 of 12 December 2001, annex, as corrected by document A/56/49 (Vol. I)/Corr.4.

and appreciates the inclusion of draft article 21 [4], which attempts to preserve the operation of international humanitarian law by declaring that the draft articles "do not apply to situations to which the rules of international humanitarian law are applicable". The United States believes, however, that relying solely on draft article 21 [4] does not sufficiently protect the integrity of international humanitarian law and would be impractical to implement. The phrasing of draft article 21 [4] is helpful insofar as it refers broadly to "situations" to which the rules of armed conflict apply — suggesting that when international humanitarian law is generally applicable to a situation (such as a "situation" of armed conflict) the draft articles do not come into play — but the commentary suggests a different approach, explaining that the draft articles "can ... apply in situations of armed conflict to the extent that existing rules of ... international humanitarian law ... do not apply." The plain wording of draft article 21 [4] appears to contemplate that the draft articles would not be applicable in such situations.

Thus, to eliminate any confusion, the United States suggests the following revision of the last sentence of paragraph (3) of the commentary to draft article 21 [4]: "Although the draft articles do not regulate the consequences of armed conflict, they can nonetheless apply in relation to disasters that happen to coincide with situations of armed conflict to the extent that the activities are not governed by international humanitarian law."

In addition, the United States recommends modifying draft article 21 to eliminate its exclusive reference to "rules" of international humanitarian law. The current reference to "rules" could, on the one hand, cause the draft article to be applied more broadly than intended. As noted by the International Court of Justice and by the Commission in the draft commentary, certain rules of international humanitarian law (such as the fundamental guarantees of humane treatment for detained persons stated in common article 3 of the 1949 Geneva Conventions) reflect "elementary considerations of humanity" that also may be applied outside the context of armed conflict. Because the application of a specific rule of international humanitarian law arguably would not necessarily mean that international humanitarian law was applicable, the reference to "rules of international humanitarian law" being applicable might be misinterpreted to suggest a broader exclusion than was intended.

The current reference to "rules of international humanitarian law" could also be misinterpreted to make draft article 21 [4] apply more narrowly than intended. As noted above, international humanitarian law is often viewed as a series of negative — that is, prohibitive or restrictive — rules, with the absence of a rule indicating that States may act. In such situations, although a specific "rule" of international humanitarian law would not apply, the principles of international humanitarian law form a general guide for conduct. In the view of the United States, the draft articles should not be applied to situations where international humanitarian law, including its principles, apply, but States have not accepted a restrictive or prohibitory rule, with a view to preserving their flexibility to conduct armed conflict as warranted by military necessity. In light of the foregoing, the United States recommends modifying draft article 21 [4] to read:

> "The present draft articles do not apply to <u>activities which are governed by international humanitarian law, including its principles and rules</u>."